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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CARTER STEPHENS,

Plaintiff and Respondent,

v.

CITY OF PASADENA FIRE
DEPARTMENT,

Defendant and Appellant.

B206529

(Los Angeles County
Super. Ct. No. BC362369)

APPEAL from a judgment and order of the Superior Court of Los Angeles
County, Charles C. Lee, Judge. Affirmed.

Michele Beal Bagneris, City Attorney, and Hugh Halford, Assistant City
Attorney, for Defendant and Appellant.

Law Offices of Carlin & Buchsbaum, Gary R. Carlin, Brent S. Buchsbaum and
Lauren N. Haag for Plaintiff and Respondent.

City of Pasadena Fire Department (City) appeals a judgment and the denial of its motion for judgment notwithstanding the verdict. The City placed Carter Stephens on a nonindustrial disability retirement after the Fire and Police Retirement System Board (Board) determined that he was psychologically unfit for duty as a firefighter. Stephens sued the City, alleging violations of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.). The jury found that Stephens was able to perform the essential functions of his job with reasonable accommodation and that the decision to subject him to a fitness-for-duty examination and retire him was discriminatory and retaliatory. The jury also found that the City failed to provide a reasonable accommodation for Stephens's perceived disability and failed to engage in an interactive process, and awarded him a total of \$1,175,847 in damages.

The City contends Stephens failed to exhaust his administrative remedies and therefore is bound by the Board's decision that he was psychologically unfit for duty as a firefighter. The City also challenges the sufficiency of the evidence to support the jury's findings, the admission of evidence, and other matters. We conclude that the City has shown no prejudicial error and affirm the judgment and order.

FACTUAL AND PROCEDURAL BACKGROUND

1. Factual Background

Stephens began working for the City in 1985, initially as a volunteer auxiliary firefighter and later as a paid employee. He is African-American. He complained to his captains of repeated instances of harassment by unknown persons who would soil his bed, boots, and uniform with feces, urine, and blood. His captains told him that there

was nothing they could do about it, and the harassment continued. One of his captains openly disparaged African-Americans, and Stephens overheard the captain refer to him as a “nigger” on one occasion. On another occasion, someone drew a swastika and other symbols on his firefighter hood. He suffered other instances of harassment as well.

Stephens filed several charges of discrimination with the United States Equal Employment Opportunity Commission (EEOC) over the years, but none of them resulted in any investigation or intervention. He filed a lawsuit against the City in 1998. The evidence in that trial was limited to a period of approximately six months, and the City won a defense verdict.

Stephens fell from a roof while fighting a fire in June 2002, injuring both knees. He underwent surgery and rehabilitation. His orthopedist reported in September 2003 that his orthopedic condition was permanent and stationary, but the written report also stated that Stephens had stated that he was performing stress conditioning treatment with another doctor who did not believe that Stephens was psychologically ready to return to work. Stephens remained off work while he consulted with a therapist and attended stress conditioning classes. He sought to return to work in February 2004, but received a letter from Karen Ezell, director of the City’s human resources department, stating that in light of his comment to his orthopedist concerning his psychological condition, she was requesting that he undergo a fitness-for-duty examination in order to determine whether he was psychologically prepared to perform the essential functions of his job. Ezell stated in a letter to the psychologist that Stephens’s statement to his

orthopedist concerning his psychological condition, his prior arrest and conviction of misdemeanor vandalism, and “his numerous unfounded discrimination complaints” all caused concern as to his psychological condition.

Dr. Cathy Goodman, a psychologist, administered tests and interviewed Stephens in March 2004. Her written report dated April 6, 2004, stated that he was given six different psychological tests. Concerning the interview portion of the examination, the report stated that Stephens “was quite defensive throughout the interview and was reluctant to disclose information,” and that he “appeared very fatigued and dozed off several times during the interview.” The report concluded, “Mr. Stephens is not recommended as fit for duty for the position of Firefighter II at this time.”

Ezell presented an application to CalPERS on April 26, 2004, requesting a disability retirement for Stephens based on the results of the fitness-for-duty examination. CalPERS forwarded the application to the Board for a decision. When he learned of the application, Stephens filed a grievance through his union. The City’s human resources department rejected the grievance on the grounds that Stephens’s employment had not yet been terminated, and also rejected his request to be examined by a mutually agreed doctor.

The Board conducted several hearings on the application for disability retirement beginning in July 2004. Stephens attended the hearings and was represented by counsel. Stephens provided a letter from a psychiatrist in August 2004 stating that the psychiatrist had been treating Stephens since January 2002 for major depressive disorder, that the condition was in full remission, and that Stephens had no current

psychological disability. The City requested a follow-up fitness-for-duty examination with Dr. Goodman. Stevens refused to participate in a follow-up examination and did not meet with Dr. Goodman again. Dr. Goodman stated in a letter dated September 1, 2004, that she had evaluated Stephens in March 2004, that “[h]e was not recommended as fit for duty at that time,” and that “Mr. Stephens’ condition appears to be permanent and stationary and no immediate recovery is seen.”

The Board rendered a decision in January 2005. The Board found that Stephens was disabled and approved his nonindustrial disability retirement. Stephens notified the Board that he was appealing its decision, but later abandoned the appeal. Stephens filed a complaint with the Department of Fair Employment and Housing (Department) on June 10, 2005, alleging disability discrimination and retaliation for his prior complaints of racial discrimination. He promptly received a right-to-sue notice.

2. Trial Court Proceedings

Stephens filed a complaint against the City in November 2006. His first amended complaint filed in February 2007 alleges counts for (1) employment discrimination based on disability, in violation of FEHA; (2) retaliation, in violation of FEHA; (3) failure to reasonably accommodate and to engage in an interactive process, in violation of FEHA; and (4) wrongful termination in violation of public policy.

The trial court granted the City’s motion in limine to preclude evidence of “any matter that might challenge the decision of the Pasadena Fire and Police Retirement System Board to grant a nonindustrial disability retirement to plaintiff.” The court granted in part the City’s motions in limine to preclude any testimony concerning

discrimination or retaliation that occurred before November 3, 1998, but ruled that Stephens could testify that he filed five discrimination charges against the City before that date, that the City prevailed at trial on some of those charges, and that the City allegedly retaliated against him for filing the charges. The court denied the City's motion in limine to preclude any testimony concerning alleged discrimination or retaliation that occurred before June 10, 2004.

The court instructed the jury on counts for (1) employment discrimination based on disability, (2) retaliation, (3) failure to reasonably accommodate, and (4) failure to engage in an interactive process to accommodate a disability. The court also instructed on the statute of limitations and other affirmative defenses. The jury returned a special verdict finding in favor of Stephens on each question presented. The jury found, among other things, that Stephens was able to perform the essential duties of a firefighter with reasonable accommodation, that the City's decision to send him for a fitness-for-duty examination and/or the subsequent application for disability retirement was a pretext for discrimination and that Stephens's perceived mental disability and his prior discrimination charges were motivating reasons for that decision, that the City failed to provide a reasonable accommodation for his perceived mental disability, and that the City failed to engage in a good faith interactive process to accommodate his perceived disability. The jury also found that Stephens filed "a timely complaint for

discrimination with the California Department of Fair Employment and Housing” and filed “a timely complaint for retaliation.”¹

The jury found that Stephens suffered a total of \$1,175,847 in damages, including \$775,847 in past and future economic losses and \$400,000 in past and future noneconomic losses. The court entered a judgment on January 15, 2008, awarding that amount.

The court denied the City’s motion for judgment notwithstanding the verdict based on the one-year statute of limitations of Government Code section 12960, subdivision (d). The court also denied the City’s new trial motion. The City timely appealed the judgment and the denial of its motion for judgment notwithstanding the verdict.²

CONTENTIONS

The City contends (1) the Board found that Stephens was psychologically unfit for duty as a firefighter and Stephens failed to challenge that decision, so he is bound by that decision and cannot now establish that he is able to perform the essential duties of a firefighter with reasonable accommodation; (2) the evidence does not support the

¹ The jury answered yes to the following questions: “Did Carter Stephens file a timely complaint for discrimination with the California Department of Fair Employment and Housing?” and “Did Carter Stephens file a timely complaint for retaliation?”

² The City also purported to appeal the denial of its new trial motion. An order denying a new trial motion is not separately appealable, but may be reviewed on appeal from the judgment. (*Walker v. Los Angeles Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 19.)

jury's finding that the decision to subject Stephens to a fitness-for-duty examination and retire him was discriminatory or retaliatory; (3) the evidence does not support the jury's finding that Stephens filed a timely complaint with the Department; (4) the denial of the City's motion in limine to preclude evidence of acts that occurred more than one year before the filing of his administrative complaint was error; (5) testimony by Stephens's psychiatrist improperly challenged the Board's binding decision that Stephens was psychologically disabled, so its admission was error; and (6) the award of damages for future lost earnings was excessive because the Board conclusively determined that Stephens was not entitled to future earnings.

DISCUSSION

1. *The City Has Not Shown that the Board Conclusively Determined that Stephens Was Unable to Perform the Essential Functions of a Firefighter with Reasonable Accommodation*

The City's first contention is based on the failure to exhaust administrative remedies. The trial court granted the City's motion in limine to preclude any evidence that would challenge the Board's decision to grant Stephens a nonindustrial disability retirement. In its opening brief on appeal, the City cites the granting of its motion in limine and argues that Stephens is bound by the Board's decision. The City argues that the Board's decision conclusively determined that Stephens was psychologically unfit for duty as a firefighter even with reasonable accommodation, but does not explain in what manner the trial court or the jury purportedly erred. The City argues in separate contentions that the admission of testimony by Stephens's psychiatrist improperly challenged the Board's decision and therefore was error, and that the Board

conclusively determined that Stephens was entitled to no damages for lost future earnings. We will address those contentions below. The nature of the purported error asserted in the City’s first contention, however, is not adequately explained.

The City apparently asserts this contention for the first time on appeal. The City cites nothing in the appellate record to show that it argued in the trial court that the court should decide as a matter of law that Stephens was unable to perform the essential duties of a firefighter even with reasonable accommodation. At trial, the City treated the issue of whether Stephens was able to perform the essential duties of a firefighter as a question of fact for the jury rather than a legal question to be decided by the court. The City requested and the court gave jury instructions on that issue, and the parties jointly drafted the special verdict form, including the question whether Stephens was “able to perform the essential job duties of a firefighter with reasonable accommodation for his mental disability?”³ Moreover, the City did not argue in its new trial motion that the failure to exhaust administrative remedies precluded the jury’s finding that Stephens was able to perform the essential duties of a firefighter with reasonable accommodation.

“The doctrine of waiver ordinarily prevents a party from arguing for the first time on appeal questions that were not presented to the trial court. (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1 [151 Cal.Rptr. 837, 588 P.2d 1261]; *In re Riva M.* (1991) 235 Cal.App.3d 403, 411-412 [286 Cal.Rptr.

³ The City does not assert instructional error and has not shown that it requested an instruction to the effect that Stephens was bound by the Board’s purported finding that Stephens was unable to perform the essential duties of a firefighter even with reasonable accommodation.

592]). The doctrine of invited error prevents a party from asserting an alleged error as grounds for reversal when the party through its own conduct induced the commission of the error. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403 [87 Cal.Rptr.2d 453, 981 P.2d 79]; *Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1414 [122 Cal.Rptr.2d 167].) Related to these doctrines is the doctrine of theory of trial: ‘Where the parties try the case on the assumption that a cause of action is stated, that certain issues are raised by the pleadings, that a particular issue is controlling, or that other steps affecting the course of the trial are correct, neither party can change this theory for purposes of review on appeal.’ (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 399, pp. 451-452.)” (*County of Los Angeles v. Southern Cal. Edison Co.* (2003) 112 Cal.App.4th 1108, 1118.)

Based on these doctrines, we conclude that after actively litigating and submitting to the jury the issue of whether Stephens was able to perform the essential duties of a firefighter with reasonable accommodation, the City cannot argue for the first time on appeal that the Board conclusively determined that issue and that the Board’s decision is binding as a matter of law. Although the exhaustion of administrative remedies has been characterized as a “jurisdictional” requirement for some other purposes (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 293), the better view is that the defense is subject to waiver and forfeiture. (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 133-136; *Mission Housing Development Co. v. City and County of San Francisco* (1997) 59 Cal.App.4th 55, 67; *Green v. City of Oceanside* (1987) 194 Cal.App.3d 212, 219-223; but see *Hood v. Hacienda La Puente*

Unified School Dist. (1998) 65 Cal.App.4th 435, 440-441 [noting prior split in authority].)

In any event, neither a written decision by the Board nor a reporter's transcript of its decision is included in the appellate record. The City cites as evidence of the Board's decision Ezell's testimony that the Board's responsibility was to "make a determination as to whether the employee is disabled or not from performing their job duties," and Stephens's affirmative response to this question on cross-examination at trial: "And at that meeting, the Fire and Police Retirement Board rendered a decision finding that you were disabled and retired you on a nonindustrial disability retirement. Is that correct?" The City, however, has not shown that the Board considered whether Stephens could perform the essential functions of his job with reasonable accommodation and acknowledges that the Board did not consider that question. The City has not shown that the Board's decision was inconsistent with the finding by the jury that Stephens was able to perform the essential duties of a firefighter with reasonable accommodation, and therefore has not shown error.

2. *The Evidence Supports the Jury's Findings that the City's Actions Were Discriminatory and Retaliatory*

The City challenges the jury's findings that the City's decisions to subject Stephens to a fitness-for-duty examination and retire him were discriminatory and/or retaliatory. We review findings by the trier of fact under the substantial evidence standard. Substantial evidence is evidence that a rational trier of fact could find to be reasonable, credible, and of solid value. We view the evidence in the light most

favorable to the judgment and accept as true all evidence tending to support the judgment, including all facts that reasonably can be deduced from the evidence. We must affirm the judgment if an examination of the entire record viewed in this light discloses substantial evidence to support the judgment. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429; *Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.)

Stephens testified that he suffered numerous incidents of discrimination and harassment based on his race, that he repeatedly complained to his superiors to no avail, and that he filed several EEOC complaints as a result. Ezell stated in a letter to Dr. Goodman's office that one of the reasons that she referred Stephens for a fitness-for-duty examination was that he had filed "numerous unfounded discrimination complaints." The jury reasonably could conclude based on the evidence presented at trial, however, that the complaints were not unfounded, that the City failed to investigate the complaints and had no basis to conclude that they were unfounded, and that the decision to order the examination was motivated in part by retaliation.

Ezell testified that after receiving Dr. Goodman's report that Stephens was unfit for duty as a firefighter "at this time," the City did not consider any reasonable accommodation, such as a medical leave of absence or reassignment to another position, but instead applied for a nonindustrial disability retirement. Ezell acknowledged that, "There appear to have been several positions that Mr. Stephens might have been qualified for and could have been accommodated." She testified that the City failed to advise Stephens of those positions and that the City should have so advised him. The

City argues that Ezell believed that she was legally compelled to seek Stephens's retirement in light of Dr. Goodman's report. The jury reasonably could conclude, however, that the City's decision to seek Stephens's retirement because of his perceived mental disability in lieu of seeking to accommodate his disability was motivated by discrimination or retaliation.

3. *The Evidence Supports the Jury's Finding that Stephens Filed a Timely Complaint with the Department*

The City also challenges the jury's finding that Stephens filed a timely complaint with the Department. We review findings by the trier of fact under the substantial evidence standard, as we have stated. The court instructed the jury that a complaint alleging discrimination or retaliation must be filed with the Department within one year after the alleged unlawful practice occurred. (See Gov. Code, § 12960, subd. (d).) The court also instructed on the continuing violation doctrine, which provides that an employer is liable for acts that occurred outside the limitations period if at least one unlawful act occurred within the limitations period and the acts were sufficiently similar in kind, occurred with reasonable frequency, and had not acquired a degree of permanence before the limitations period began. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1057-1059; *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823.)

The City contends the jury identified only two acts of discrimination or retaliation, and both occurred outside the limitations period. Questions 4 and 11 on the special verdict form asked whether the City's decision to send Stephens for a fitness-for-duty examination and/or its subsequent application for disability retirement

were discriminatory or retaliatory.⁴ The jury answered yes to both questions. The City argues that the special verdict fails to identify any act of discrimination or retaliation that occurred within the limitations period, so the jury's finding that the complaint was timely therefore was contrary to law and incorrect. We understand the City's argument to be that the special verdict findings are inconsistent.

We review the special verdict de novo to determine whether its findings are inconsistent. (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1092.) We construe the verdict in light of the instructions given and the evidence presented at trial. (*Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456-457.) In our view, the findings that certain acts occurring more than one year before the filing of the complaint with the Department were discriminatory and retaliatory are not inconsistent with the finding that the complaint was timely. The jury did not find that the initial decision to send Stephens for a fitness-for-duty examination and the subsequent application for disability retirement were the *only* acts of discrimination or retaliation that occurred. Rather, the instructions on the continuing violation doctrine and the evidence presented at trial support the jury's finding that the complaint was timely filed within one year after the occurrence of other acts that were part of the same course of conduct. The City's request for a follow-up fitness-for-duty examination and its continued prosecution of the request for disability retirement both occurred within one year before the filing of Stephens's complaint with the Department.

⁴ Both events occurred before June 10, 2004.

Moreover, the City's failure to reasonably accommodate his perceived disability and to engage in an interactive process continued until he was retired in January 2005. The jury reasonably could conclude that those and other acts within the same course of conduct were sufficiently similar in kind, occurred with reasonable frequency, and had not acquired a degree of permanence before June 10, 2004.

4. *The Denial of the City's Motion in Limine Was Proper*

The City challenges the denial of its motion in limine to preclude evidence of acts that occurred more than one year before the filing of Stephens's complaint with the Department. The City argued in its motion in limine that any claims based on acts that occurred more than one year before June 10, 2005, were barred by the statute of limitations of Government Code section 12960, subdivision (d), and that any evidence of such acts therefore would be irrelevant and unduly confusing or misleading under Evidence Code sections 350 and 352.

A trial court has broad discretion when ruling on the admissibility of evidence under Evidence Code sections 350 and 352. (*People v. Gurule* (2002) 28 Cal.4th 557, 654; *People v. Waidla* (2000) 22 Cal.4th 690, 717-718.) A court abuses that discretion and commits error only if the ruling is arbitrary, capricious, or patently absurd. (*People v. Ochoa* (2001) 26 Cal.4th 398, 437-438.) We can reverse a judgment based on the erroneous admission of evidence only if it is reasonably probable that the appellant would have obtained a more favorable result absent the error, so the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; Evid. Code, § 353, subd. (b); *People v. Rains* (1999) 75 Cal.App.4th 1165, 1170.)

The City does not meaningfully discuss the evidence allegedly improperly admitted or explain why its admission was improper, apart from the broad argument that it was irrelevant. We conclude that evidence of some acts occurring before June 10, 2004, was relevant to the continuing violation doctrine, as we have stated, that the City has shown no error in the admission of that evidence, and that the City has not shown either that the admission of other evidence of acts occurring before that date was an abuse of discretion or that any error was prejudicial.

5. *The Admission of Testimony by Stephens's Psychiatrist Was Proper*

The City contends testimony by Dr. James Rosenberg, a psychiatrist who examined Stephens, improperly challenged the Board's decision that Stephens was psychologically unfit for duty, in violation of the order in limine precluding evidence of "any matter that might challenge the decision of the Pasadena Fire and Police Retirement System Board to grant a nonindustrial disability retirement to plaintiff." The City objected to the testimony during trial, before the testimony was offered, on the ground that the testimony would challenge the Board's decision. Stephens's counsel stated that the purpose of the testimony was not to challenge the Board's decision, but to show that Dr. Goodman had no valid reason to find Stephens unfit for duty. The court overruled the objection.

The City also argued in its new trial motion that the admission of Dr. Rosenberg's testimony was prejudicial error. Stephens argued in opposition that the testimony showed that the decision to order a fitness-for-duty examination caused him emotional distress, that there was no reasonable basis for Dr. Goodman to conclude that

he was psychologically unfit for duty, and that Dr. Rosenberg's testimony did not challenge the Board's decision. The court denied the new trial motion, "on the grounds set forth in the opposition."

In overruling the City's objection to Dr. Rosenberg's testimony and denying its new trial motion challenging the admission of that testimony, the trial court determined that the testimony was admissible. We review a ruling on the admissibility of evidence under the abuse of discretion standard. (*People v. Waidla, supra*, 22 Cal.4th at p. 717.) We find no abuse of discretion. Stephens's fitness for duty as a firefighter with reasonable accommodation was a disputed issue, and Dr. Rosenberg's testimony was relevant to that issue. The City has not shown that the testimony was unduly prejudicial, confusing, or misleading. The City has not shown that the Board conclusively determined that Stephens was unfit for duty as a firefighter with reasonable accommodation and has not shown that Dr. Rosenberg's testimony improperly challenged any decision by the Board. Moreover, the trial court's determination in denying the new trial motion that Dr. Rosenberg's testimony did not violate its order in limine is entitled to considerable deference. In any event, the trial court's initial ruling on the admissibility of evidence is not binding on the court if the evidence is proffered later in trial. (*People v. Williams* (1997) 16 Cal.4th 153, 197.)

6. *The Award of Damages for Lost Future Earnings Was Proper*

The City contends the Board's decision granting its request for a nonindustrial disability retirement conclusively determined that Stephens was entitled to a disability pension only and no future earnings, so the award of damages for lost future earnings

was excessive. The City does not challenge the award of damages on any other grounds and does not challenge the jury's calculation of the amount of lost future earnings.

Stephens presented expert testimony on lost future earnings and the greater retirement benefits that he would receive if he continued to work as a firefighter until age 65. The court instructed the jury on future economic losses, including lost earnings and medical expenses. The jury awarded \$595,236 in future economic losses.

The City does not contend the evidence does not support an award of damages in that amount, but contends the Board's decision precludes an award of damages for future lost earnings as a matter of law. We disagree. The City's duty to provide a reasonable accommodation for Stephens's perceived disability arose under FEHA (Gov. Code, § 12940, subd. (m)), as does his right to recover damages for the City's breach of that duty. The Board did not consider whether Stephens could perform the essential functions of his job with reasonable accommodation, so its decision was not inconsistent with the jury's finding that Stephens was able to perform the essential functions of his job with reasonable accommodation or with the jury's award of damages for lost future earnings.

DISPOSITION

The judgment and order are affirmed. Stephens is entitled to recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

KITCHING, J.